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No. 13—Consolidated with No. 15

IN THE
Supreme Court of the United States

October Term, 1968

**THE BALTIMORE AND OHIO RAILROAD
COMPANY ET AL.,**

Appellants,

v.

**ABERDEEN AND ROCKFISH RAILROAD
COMPANY ET AL.,**

Appellees.

**On Appeal From the United States District Court for the
Eastern District of Louisiana, New Orleans Division**

**ANSWER TO NEW MATTER IN SOUTHERN LINES'
REPLY TO PETITION FOR REHEARING**

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Northern lines will not answer all the assertions and arguments made in Southern lines' reply. They will deal with the new matters that are represented by Southern lines' arguments concerning Northern lines' promise to re-settle in accordance with the condition in the District Court's order denying an interlocutory injunction, with Southern lines' argument based upon non-rétroactivity of divisions prescribed under § 15(6) of the Interstate Com-

merce Act, and their argument based upon the public interest.

I. The Southern railroads urge that the Northern lines must pay over to Southern lines some \$25 million and that the Southern lines shall forever keep this money regardless of whether the Commission should, on remand, validly find that the relative service costs of Northern and Southern railroads are such as to sustain the divisions prescribed by the order under review (Reply, pp. 6-7).

In support of this position, Southern lines argue, *inter alia*, that Northern lines promised to pay over to the Southern railroads the money collected under the Commission's order of February 3, 1965, if that order were subsequently held "to be invalid" (Reply, p. 2). The District Court's order, however, and Northern lines' promise was that they would resettle their accounts with Southern lines on the basis of the old divisions "if the Commission's order should be permanently set aside" (Petition, p. 2). The petition asks that final decree be stayed pending consideration by the Commission upon remand (Petition, p. 8) and points out that until the Commission makes the specific findings required by this Court's opinion it cannot be known whether a permanent setting aside of the order would be appropriate (Petition, p. 2). If the stay were granted, the obligation imposed by the District Court's order and the Northern lines' promise to be bound thereby would not arise at this time, at least.

It is said on p. 6 of the Reply that the District Court's final judgment "affirmed by this Court (393 U.S. at 96), sets aside the Commission's order" and that the Commission's order granting increased divisions "will never—under any circumstances—go into effect." The Commission's order granting increased divisions has been in effect since April 20, 1965, and, if this Court should grant the

instant petition for the withholding of final decree, and the Commission then makes valid findings in the remand proceedings, the order prescribing new divisions can continue in effect.¹

In this connection, it should be noted that with respect to the three cost adjustments as to which this Court concluded the Commission's findings were defective, it will be possible for the Commission, on remand, to conclude that the Northern lines' costs are relatively as high or higher than those originally found. For example, the most important of these cost adjustment issues before the Court was the one relating to commutation deficits. The gist of the Southern lines' argument and the Court's holding with respect to this matter was that costs solely related to commutation service were not shown by the Commission's decision to have any relation to North-South freight transportation, the cost of which was the Commission's standard for decision. Southern lines admitted at the argument (Transcript of Argument, pages 60-63) and in their brief in this Court (fn. 20, p. 34) that deficits arising from costs which are solely related to the provision of other passenger services must likewise be excluded. Southern lines' own computation of the portion of their solely related passenger deficit that is allocated to North-South traffic was \$1,502,181 (Southern lines' Exceptions to Recommended Report, p. 119). The cost study contained nothing for solely related

1. Southern lines' argument that a judgment holding an ICC order invalid may be stayed pending further Commission action only if the invalidity lies in the lack of necessary findings or some procedural defect is unsound. In *United States v. Morgan*, 307 U.S. 183 (1939) the defect involved was the lack of a fair hearing, and in *Addison v. Holly Hill Fruit Products, Inc.*, 322 U.S. 607 (1944), the defect was a mistake of law in the application of a statute. And see *Atlantic Coast Line R. Co. v. Florida*, 295 U.S. 301 (1935) where the Commission's action in the proceeding following the condemnation of its first order was based upon new evidence and new findings. (295 U.S. at p. 307).

passenger deficits of Northern lines; they had no such deficit. Accordingly, the effect of this cost adjustment (to exclude Southern lines' solely related passenger deficit) will be to substantially increase Northern lines' relative share of the cost of performing the North-South freight service. This example, based upon the most prominent of the defective findings, will serve to exemplify the fact that it is entirely reasonable to believe that the Commission may issue a valid report finding that Northern lines' costs are at least as high in relation to Southern lines as found in the original report. If, as Northern lines believe, their costs should be found to be somewhat higher in relation to Southern lines than as originally found, Northern lines would waive the difference and ask the Commission simply to confirm the divisions originally prescribed which would have remained in effect if the instant petition to this Court should be granted.²

II. Southern lines' § 15(6) argument is that to grant the relief sought by the petition would be contrary to the policy of that statute which withholds from the Commission the power to make a divisional order retroactive except in circumstances not here present. A grant of the relief sought by the petition would not entail the making of a retroactive divisions order by the Commission. It would simply require that a final decree by the lower court be withheld until the Commission has issued its report on

2. Southern lines argue (Reply, pp. 18-19) that this Court first decided that the evidence did not sustain the Commission's order and that it then separately held that the findings were defective. But the issue as to lack of substantial evidence involved only the Commission's findings with relation to seven proposed cost adjustments. Contrary to the action of the District Court, this Court held that as to four thereof the Commission's findings were adequate. This conclusion was not simply that they satisfied the requirement that findings must explain the basis for the Commission's action; it was clearly a conclusion that the findings had a substantial evidentiary basis.

remand. It will also be noted that the limitation in § 15(6) is on the power of the Commission, and not upon the powers of a court of equity.

III. Under their public interest discussion, entirely overlooking the \$25 million which Southern lines say they should have and forever keep, those lines urge that the Northern lines' petition is predicated entirely upon accounting expenses in making settlements and resettlements and they refer (p. 5) to certain affidavits of Northern lines with respect to resettlement costs but do not disclose their own affidavits showing substantially higher figures. Thus, in the affidavit of Mr. Luckett, it is stated, with respect to the Southern Railway, that:

"This [the Southern's] study shows that the additional accounting costs alone would be \$190,000 plus \$66,000 per month for each month that the new division basis is temporarily in effect. This means that if the divisions were changed on April 20 [1965] and the return to the present basis of divisions should be delayed for twelve months from the effective date of the Commission's order, the additional accounting expense incurred by Southern would amount to \$982,000. In the event the Commission's order is set aside there would be no way in which Southern could recover the amount of this additional expense."

If Mr. Luckett is correct, for the four years since the new divisions went into effect the accounting expenses as to the Southern Railway alone—just one of many Southern railroads—would amount to over \$3,350,000. The District Court made no finding as to the amount of this accounting cost, but dealt with the question by providing in its order that the Northern lines would have to bear the costs of resettlement if there were a resettlement.

With respect to the argument that there is no public interest involved in this matter, a requirement that the Northern lines pay \$25 million to Southern lines, which Southern lines shall keep regardless of any other facts, would be a direct and severe blow to the public interest. In 1967, the latest year for which the figure is available, Northern railroads had a rate of return of 1.58% on net property investment, the lowest of any group of railroads in the country. *Increased Freight Rates, 1968*, 332 I.C.C. 590, 607. These are the railroads serving the most populous area of the United States.

Respectfully submitted,

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